Tan Ong Keong v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–20 OF 2010
SULAIMAN DAUD, SYED AHMAD HELMY AND ABDUL WAHAB PATAIL JJCA
14 MARCH 2012

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking 1,215.7g methamphetamine — Appeal against conviction and sentence — Drugs found on appellant at International Arrival Hall of Kuala Lumpur International Airport — Whether fatal for prosecution not to have asked chemist whether drug was listed in First Schedule — Whether variations in description of exhibits in search list created doubt as to identity of exhibits — Whether appellant had knowledge of contents of the bag — Whether appellant not attempting to run away when substance was found amounted to inference in his favour

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Criminal Procedure — Prosecution — Prima facie case — Duty of court at end of prosecution's case — Court to examine prosecution evidence sceptically but not as a sceptic who refuses to believe anything without direct, physical or personal evidence — Court to examine whether there were gaps in prosecution's case

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The appellant was convicted upon the charge that he had at the International Arrival Hall in the Kuala Lumpur International Airport trafficked in 1,215.7g of methamphetamine, thereby committing an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The appellant appealed against the conviction and sentence on three grounds. Firstly, it was argued that the chemist ('SP1') was questioned whether amphetamine was listed in the First Schedule to which he had answered that amphetamine and ketamine were listed in the First Schedule. Hence, the issue raised was whether it was fatal not to have asked SP1 whether the methamphetamine he found is listed in the First Schedule. Secondly, the appellant contended that variations in the description of the exhibits in the search list created a doubt as to the identity of the exhibits. Two packets were described in the Kimia 14 as 'bahan kristal jernih kekuningan' while the third was stated to be 'bahan serbuk putih kekuningan'. The annex to the same document described all three packets as containing 'bahan kristal cerah kekuningan'. The search list described the substance in the three packets as 'bahan kristal keputihan'. Thirdly, it was submitted that the learned judicial commissioner had erred in finding that the appellant had knowledge of the contents of the bag P9. It was claimed that it was the appellant who pulled the bag P9 to SP2 and asked SP2 if the bag had to be scanned. The appellant had not attempted to run away when the substance was found. Hence it was

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submitted that the appellant should be given the benefit of the doubt of the more favourable inference.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Although SP1 was not asked the question whether methamphetamine was listed in the First Schedule, it was clear 'Methamphetamine' is listed in the First Schedule. The question relating to amphetamine was, in the context of this case, a stray question; *Shukri bin Mohamed v Public Prosecutor* [1995] 3 MLJ 229 (SC) not followed (see para 9).

(2) SP4, before who the bag containing the packets were opened, described the three packets wrapped in transparent plastic contained 'bahan kristal jernih keperangan'. She had marked the exhibits and had identified the exhibits in court. Descriptions of colour depend as much upon the acuity of vision and ambient light as upon one's command of language, particularly vocabulary, to describe the shade precisely. Hence, unless tested in cross-examination, and the answers in cross-examination show that the differences in description were more than just linguistics, very little weight can be given to the differences. The differences in description as a ground was not addressed in the submissions and in the grounds of decision because it was neither raised nor did it form part of the defence (see para 13).

(3) In evaluating the facts, the court must examine the evidence adduced by the prosecution and the inferences to be drawn, sceptically, but not as a sceptic who refuses to believe anything without direct, physical or personal evidence. At the end of the prosecution's case, the court must examine whether there are gaps in the prosecution's case, in terms of the chain of evidence or the ingredients of the offence, and if there are no gaps, whether the prosecution made out a prima facie case (see para 21).

(4) The evidence before the learned judicial commissioner was that a passenger with a baggage tag in his name, collected the corresponding bag. The logical conclusion was that it was his bag and that the owner knew the contents kept or secreted in the bag and the nature of such contents. It is always possible it was not his bag, but there was no evidence before the court at that stage that it was not his bag. The possibility that he did not know remained mere possibility. It was neither a gap nor a reasonable doubt in the prosecution's case (see para 24).

(5) Since the version testified by the appellant was found by the trial judge to be highly implausible and inherently improbable, it could not therefore provide the least probability to the defence version that the appellant was not the owner of the bag and did not know the nature of the contents secreted in the bag as a proscribed substance (see para 31).

[Bahasa Malaysia summary

Perayu telah disabitkan atas pertuduhan bahawa dia telah, di Dewan Ketibaan Antarabangsa di Lapangan Terbang Antarabangsa Kuala Lumpur, mengedar 1,215.7g dadah jenis methamphetamine, dan dengan itu melakukan suatu kesalahan di bawah Akta s 39B(1)(a) Akta Dadah Berbahaya 1952. Perayu merayu terhadap sabitan dan hukuman atas tiga alasan. Pertama, adalah dihujahkan bahawa pakar kimia ('SP1') telah disoal sama ada amphetamine disenaraikan dalam Jadual Pertama yang mana dia telah menjawab bahawa amphetamine dan ketamin disenaraikan dalam Jadual Pertama. Oleh itu, isu yang dibangkitkan adalah sama ada ia menjejaskan untuk tidak menanyakan SP1 sama ada methamphetamine yang dijumpainya disenaraikan dalam Jadual Pertama. Kedua, perayu menghujahkan bahawa variasi dalam deskripsi ekshibit-ekshibit dalam senarai carian menyebabkan keraguan tentang identiti barang kes tersebut. Dua paket telah diterangkan dalam Kimia 14 sebagai 'bahan kristal jernih kekuningan' manakala yang ketiga telah dinyatakan sebagai 'bahan serbuk putih kekuningan'. Lampiran kepada dokumen yang sama menyifatkan ketiga-tiga paket tersebut sebagai mengandungi 'bahan kristal cerah kekuningan'. Senarai carian menyifatkan bahan di dalam ketiga-tiga paket tersebut sebagai 'bahan kristal keputihan'. Ketiga, ia telah dikemukakan bahawa pesuruhjaya kehakiman yang terpelajar telah terkhilaf dalam dapatan bahawa perayu mempunyai pengetahuan mengenai kandungan beg P9. Didakwa bahawa perayulah yang telah menarik beg P9 kepada SP2 dan meminta SP2 jika beg tersebut perlu diimbas. Perayu tidak cuba untuk melarikan diri apabila bahan tersebut dijumpai. Oleh itu, dihujahkan bahawa perayu perlu diberi manfaat keraguan inferens yang lebih baik.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Walaupun SP1 telah tidak ditanya sama ada methamphetamine disenaraikan dalam Jadual Pertama, ia adalah jelas 'Methamphetamine' disenaraikan dalam Jadual Pertama. Soalan yang berkaitan dengan amphetamine adalah, dalam konteks kes ini, soalan sesat; *Shukri bin Mohamed v Public Prosecutor* [1995] 3 MLJ 229 (MA) tidak diikut (lihat perenggan 9).

(2) SP4, yang mana beg yang mengandungi paket tersebut telah dibuka di hadapannya, menyifatkan tiga paket yang dibalut dengan plastik telus mengandungi 'bahan kristal jernih keperangan'. Dia telah menandakan ekshibit-ekshibit tersebut dan telah mengenal pasti ekshibit tersebut di mahkamah. Perihal warna bergantung kepada ketajaman penglihatan dan cahaya ambien dan juga penguasaan bahasa, khususnya perbendaharaan kata, untuk menggambarkan ronanya dengan tepat. Oleh itu, melainkan jika diuji dalam pemeriksaan balas, dan jawapan-jawapan dalam pemeriksaan balas menunjukkan bahawa perbezaan dalam keterangan adalah lebih kepada linguistik, sangat sedikit pemberatan yang diberikan kepada perbezaan. Perbezaan dalam

keterangan sebagai alasan tidak dinyatakan dalam permohonan dan alasan-alasan keputusan kerana ia tidak dibangkitkan dan ia tidak menjadi sebahagian daripada pembelaan (lihat perenggan 13).

(3) Dalam menilai fakta-fakta, mahkamah perlu meneliti keterangan yang diberikan oleh pihak pendakwaan dan kesimpulan dibuat, secara skeptikal, tetapi bukan sebagai skeptis yang enggan mempercayai sesuatu tanpa bukti langsung, fizikal atau peribadi. Di akhir kes pendakwaan, mahkamah perlu meneliti sama ada terdapat jurang dalam kes pendakwaan, dari segi rantaian keterangan atau kandungan kesalahan tersebut, dan jika tidak terdapat jurang, sama ada pihak pendakwaan membuktikan kes prima facie (lihat perenggan 21).

(4) Keterangan di hadapan pesuruhjaya kehakiman terpelajar adalah bahawa penumpang dengan bagasi dengan tag namanya, mengumpulkan beg yang sama. Kesimpulan yang logik adalah ia adalah begnya dan bahawa pemilik tahu akan kandungan dan sifat kandungan yang disimpan atau yang diletakkan di dalam beg itu. Ia berkemungkinan bukan begnya, tetapi tiada bukti di hadapan mahkamah pada peringkat itu bahawa ia bukan begnya. Kemungkinan bahawa dia tidak tahu kekal kemungkinan semata-mata. Ia bukan jurang mahupun keraguan yang munasabah dalam kes pendakwaan (lihat perenggan 24).

(5) Oleh kerana versi yang diberikan oleh perayu didapati oleh hakim bicara sebagai sangat tidak masuk akal dan sememangnya tidak mungkin, ia tidak dapat mengemukakan kebarangkalian versi pembelaan bahawa perayu bukan pemilik beg tersebut dan tidak tahu jenis kandungan yang diletakkan di dalam beg adalah bahan yang diharamkan (lihat perenggan 31).]

Notes

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 3109–3135.

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 445–592.

Cases referred to

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

Shukri bin Mohamad v PP [1995] 3 MLJ 229, SC (not folld)

Legislation referred to

Criminal Procedure Code s 180(4)

Dangerous Drugs Act 1952 ss 2, 39B(1)(a), (2), First Schedule

Appeal from: Criminal Trial No 45–156 of 2007 (High Court, Shah Alam)

Kitson Foong (Ahmad Zaidi Zainal with him) (Ahmad Zaidi & Partners) for the appellant.
Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Tan Ong Keong was convicted upon the charge that on 10 July 2007 at about 12.10 in the morning at the International Arrival Hall in the Kuala Lumpur International Airport, in the District of Sepang, in the State of Selangor Darul Ehsan, had trafficked in a dangerous drug to wit 1,215.7g of methamphetamine, thereby committing an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) thereof.

[2] Before us, the conviction and sentence was attacked on a number of grounds which may be grouped as follows:

(a) description of the dangerous drug;

(b) identity of the exhibits; and

(c) knowledge of contents of the bag.

DESCRIPTION OF THE DANGEROUS DRUG

[3] The dangerous drug that is the subject of the charge against the appellant is methamphetamine ('the proscribed substance'). It was submitted that since the charge is for trafficking in methamphetamine, the learned judicial commissioner had erred in failing to take into consideration that the chemist, Abdul Rahim bin Shadan ('SP1'), at p 15 of the notes of evidence, had testified as follows:

> TPR:Adakah dadah Amphetamine disenaraikan dadah merbahaya dalam Akta Dadah Merbahaya?
>
> SP1: Ya. Amphetamine dan ketamine adalah disenaraikan dalam Jadual Pertama Akta Dadah Berbahaya, 1952.

[4] Without drawing any conclusions therefrom, we observe the fact SP1 was not cross-examined. To understand why he was not cross-examined, we examined his testimony.

[5] Counsel relied upon *Shukri bin Mohamad v Public Prosecutor* [1995] 3

MLJ 229 (SC) ('Shukri defence') for the proposition the chemist must say it was methamphetamine as listed in the First Schedule. The question put before this court is whether it is fatal not to have asked SP1 whether the methamphetamine he found is listed in the First Schedule.

[6] In *Shukri bin Mohamad v Public Prosecutor* [1995] 3 MLJ 229 (SC), it was explained that:

> The judge's notes of evidence shows that there were repeated references by the chemist to the expression 'Cannabis as defined in the DDA 1952' with no mention made at any time of the definition section in the Act, of cannabis, to wit, s 2, which at the material time, provided as follows: 'cannabis' means any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated.
>
> The glaring omission by the chemist to refer to s 2 of the Act could give rise to the inference that he did not have in mind the ingredients of cannabis as defined therein, and as explained in the Supreme Court case of *Public Prosecutor v Alcontara* [1992] 3 MLJ 568 at p 577.

[7] Pages 8 and 9 of the notes of evidence records the testimony of SP1 that he had found two plastic packets marked A-1(1) and A-1(2) and one plastic packet A-1(3)(1) in a plastic packet marked A-1(3). Page 11 of the notes of evidence records his testimony that he found packet A-1(1) to contain 394.9g methamphetamine and 25.4g ketamine and that packet A-1(2) to contain 676.7g of methamphetamine and 70.1g of ketamine. Page 12 of the notes of evidence records his testimony that he found the plastic packet A-1(3)(1) to contain 144.1g of methamphetamine and 59.7g ketamine. The total quantity of methamphetamine was 1,215.7g. This is the proscribed substance the appellant was charged for trafficking in.

[8] SP1 had answered correctly to the question put to him that amphetamine is a dangerous drug listed in the First Schedule of the Dangerous Drugs Act. It is listed in Part III. We observe that they are listed in the said schedule, along with '2,5-Dimethoxy amphetamine (DMA)', 'Dimethoxy bromoamphetamine (DOB)', '2, 5-Dimethoxy-4-ethylamphetamine (DOET)', '5-Methoxy-3, 4-methylendioxy amphetamine (MMDA)', 'Methylenedioxy amphetamine (MDA)', '3,4-Methylenedioxy methamphetamine (MDMA)', '4-methyl thioamphetamine (4-MTA)', 'Parahexyl, 3-hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d] pyran Paramethoxyamphetamine (PMA)', and '3,4,5- Trimethoxyamphetamine (3,4,5-TMA)', the drug 'methamphetamine' is also listed.

[9] Hence, although SP1 was not asked the question whether

methamphetamine is likewise listed, it is clear 'methamphetamine' is listed in the First Schedule. The question relating to amphetamine is, in the context of this case, a stray question.

[10] It is plain that the question addressed in *Shukri bin Mohamad v Public Prosecutor* was not that the chemist should have been asked whether it was cannabis as defined in the DDA 1952, or for that matter as listed in the First Schedule, but whether he has addressed his mind to the question to the ingredients of cannabis that formed the offence since in that case what was proscribed and was the subject of the offence was 'cannabis from which the resin had not been extracted', and not simply cannabis. There is no similar qualification with regard to methamphetamine to make it necessary to ask the question in this case 'Is it a form of methamphetamine that is prohibited under the First Schedule?'. The 'Shukri defence' is, therefore, not applicable in the case of methamphetamine, and the learned judicial commissioner had not erred in not rejecting the evidence relating to the proscribed substance.

[11] For these reasons, we dismissed this first ground of appeal.

IDENTITY OF THE EXHIBITS

[12] It was submitted that variations in the description of the exhibits in the search list, Form Kimia 14 and its annex created a doubt as to the identity of the exhibits. Two packets were described in the Kimia 14 by SP5 as 'bahan kristal jernih kekuningan' while the third was stated to be 'bahan serbuk putih kekuningan'. The annex to the same document described all three packets as containing 'bahan kristal cerah kekuningan'. And in the search list completed by SP5 and signed by both SP5 and the appellant, the substance in the three packets were described as containing 'bahan kristal keputihan'.

[13] Perusal of the record shows that Puan Wahizam bt Abdul Wahid SP4, before who the bag containing the packets were opened, described the three packets wrapped in transparent plastic contained 'bahan kristal jernih keperangan'. She had marked the exhibits and had identified the exhibits in court. She identified the 'Borang Penyerahan Barang-Barang Kes' that she prepared and signed. We observe the three packets were described as containing 'bahan kristal kejernihan'. Nowhere was their description of the colour of the substance put to these two key witnesses, to enable the court to consider their answers, whether they were mere differences in description or reflected a reasonable doubt that the substance submitted to the Chemistry Department with Form 14 and the substance found in the black bag belonging to the appellant at the International Arrival Hall were not the same. The terms 'keperangan', 'kejernihan', 'kekuningan' and 'keputihan' are terms of general description, and does not mean the substance was exactly 'perang', 'jernih',

'kuning' or 'putih'. The combination of the prefix 'ke' and suffix 'an' to the words correspond to the use in the English language of the suffix 'ish', as in 'goldish', 'clearish', 'yellowish' and 'whitish' to describe a general property. Furthermore, colour comes in an infinite number of shades. As often as not, descriptions of colour depend as much upon the acuity of vision and ambient light as upon one's command of language, particularly vocabulary, to describe the shade precisely. Hence, unless tested in cross-examination, and the answers in cross-examination show that the differences in description were more than just linguistics, very little weight can be given to the differences. The differences in description as a ground was not addressed in the submissions and in the grounds of decision because it was neither raised nor did it form part of the defence. Evidently these limitations were recognised at the trial. It was not made an issue before the relevant witnesses. In the circumstances, the learned judicial commissioner cannot be said to have erred.

[14] We observe also that these differences of description were made by the same person, SP5, whose testimony at the trial in respect of the substance he took custody of and delivered to the Chemistry Department, remained unchallenged and therefore unshaken in cross-examination. It leaves no room for doubt therefore that the substance found in the three packets in the bag and the substance submitted to the Chemistry Department for analysis are the same.

[15] We, therefore, dismissed this second ground of appeal.

KNOWLEDGE OF CONTENTS OF THE BAG P9

[16] It was submitted that the learned judicial commissioner had erred in finding that the appellant had knowledge of the contents of the bag P9. The facts relied upon in support of this submission were the three facts that it was the appellant who (i) pulled the bag P9–SP2, (ii) asked SP2 if the bag had to be scanned, and (iii) had not attempted to run away when proscribed substance was found. It was further submitted that the appellant should be given the benefit of the doubt of the more favourable inference.

[17] It is trite that knowledge, a mental element, is not capable of proof by direct evidence. Knowledge is therefore inferred from other facts. The question before us is whether these facts, in all the circumstances of this case, leaves either a gap in the prosecution's case or a reasonable doubt as to the appellant's knowledge of the existence of the substance in the bag and the nature of it as a proscribed substance.

[18] We considered in two parts, firstly, as at the end of the prosecution's case, and secondly, as at the end of the defence's case.

[19] We accept the submission that the facts relied upon can give rise to the inference that he had no knowledge of the presence of the proscribed substance in the bag or its nature as a proscribed substance. We recognise, however, that except in the case of the clearest and most direct proof of guilt, almost all other combination of facts are always capable, at the same time, of an inference of guilt as well as of innocence. To put it another way, it is always possible to structure an interpretation or inference consistent with innocence. But if in every case an accused is acquitted simply because it is possible to construct such an interpretation or inference, the law cannot be enforced. Indeed, not only will the law become impossible to be enforced, but the courts will be viewed as being naive and gullible. Although this might be much appreciated by accused persons, the courts will cease to be respected by the general public who expect the courts to exercise at least some modicum of wisdom. The balance between, on the one hand, justice, fairness and protection of the public, and on the other, avoidance of the possibility of convicting an innocent person is articulated in the distinction between a shadow of a doubt and a reasonable doubt. Denning J (as he then was) summarised the distinction in *Miller v Minister of Pensions* [1947] 2 All ER 372, pp 373–374 in these words:

> … It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'Of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; nothing short will suffice.

[20] There is a fine line between a possibility and the least probability. The former is a question of logic and reasoning. It is hypothetical or theoretical. The latter tests the hypothesis or theory with the facts of the particular case, in order to discern whether on the facts of that particular case there is the least probability.

[21] In evaluating the facts, the court must examine the evidence adduced by the prosecution and the inferences to be drawn, sceptically, but not as a sceptic who refuses to believe anything without direct, physical or personal evidence. At the end of the prosecution's case, the court must examine whether there are gaps in the prosecution's case, in terms of the chain of evidence or the ingredients of the offence, and if there are no gaps, whether the prosecution made out a prima facie case. Section 180(4) of the Criminal Procedure Code explains that a prima facie case 'is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction'.

[22] If the defence is called, the defence is examined as to whether it raises a

reasonable doubt. If the particular facts of the case show there is, objectively, the slightest probability that the innocence of the accused is not a mere shadow of a doubt, then he must be acquitted. An accused person enjoys a double advantage in that he succeeds so long as the facts he relies upon raises the slightest probability of his innocence, and to prove those facts he may rely upon evidence that in the slightest probability supports the facts he relies on.

AS AT THE END OF THE PROSECUTION'S CASE

[23] As at the end of the prosecution's case, the evidence before the trial judge were that of the prosecution's witnesses who has testified and had their testimonies tested in cross-examination, and the exhibits produced. As the record and the discussion earlier above shows, there were no gaps in the prosecution's evidence. The cross-examination outlined the key defences of the appellant, but the answers to the questions in cross-examination provided no rebuttal or explanation for the appellant.

[24] While we accept it is always possible that a person who approaches a customs officer to ask if the latter requires his bag to be scanned, has no knowledge that the bag contains a proscribed substance, and a person who does not try to run away when proscribed substance is discovered, does not know the nature of the substance as a proscribed substance, we find that, to borrow the words of Denning J, the learned judicial commissioner would be failing in her duty to uphold the law and to protect the society at large if she permitted herself to accept fanciful possibilities to deflect the course of justice. The evidence before the learned judicial commissioner was that a passenger with a baggage tag in his name, collected the corresponding bag. The logical conclusion is that it was his bag and as the owner knows the contents kept or secreted in the bag and the nature of such contents. It is always possible it is not his bag, but there is no evidence before the court at that stage it was not his bag. The possibility that he did not know remained mere possibility. It is neither a gap nor a reasonable doubt in the prosecution's case.

[25] We conclude the learned judicial commissioner did not err in finding that the prosecution had made out a prima facie case and in therefore calling upon the appellant as the accused to enter upon his defence.

AS AT END OF THE DEFENCE'S CASE

[26] In the second part, we considered the evidence adduced by the appellant. The appellant took oath and testified in his own defence.

[27] He testified he had attended school to primary six, was not involved in drugs, had not committed offences previously and did not know what drugs

looked like. He had two shops for lock services. He first came to know Ah Poh in 2005 when the latter came to his shop and used to visit his shop thereafter.

[28] His testimony shows he is an experienced traveller who, before his trip to China, had travelled to Singapore, Thailand and Cambodia. The first time he went to China was in March 2007. He landed in Shenzen with his friend Ah Poh who he had known since 2005. Ah Poh was a building contractor and brought the appellant to handle door-lock installation. The costs were borne by Ah Poh who paid him a salary of RM3,000 per month. They stayed in Shenzen for three days and came back to Malaysia. The second time they went was in April 2007 and stayed in Shenzen for a week and came back. They went again in May 2007. This time they landed in Macau Airport for a three days holiday before proceeding to Shenzen. This time they stayed for two months. While there they went to Hong Kong to renew the appellant's visa. While in Hong Kong Ah Poh suddenly told him to get ready as they were to return to Malaysia. At the airport before checking in Ah Poh received a telephone call and told him to return alone as Ah Poh could not go back yet.

[29] He testified when going to the airport he had brought with him a pair of trousers and a shirt. He explained this was because the project in Shenzen was not completed and Ah Poh said he had to return to Shenzen again. When asked how he carried his trousers and bag, he said Ah Poh told him to put them into Ah Poh's bag and return to Malaysia first. He explained he was to hand over the bag to Ah Poh's worker.

[30] The learned judicial commissioner said:

> On careful consideration, I find the accused story highly implausible and inherently improbable for the following reasons:
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> (1) Ah Poh was never produced as a witness by the defence.
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> (2) The accused did not know Ah Poh's full name, although he claimed to have been acquainted with Ah Poh two years previously, had accompanied him to Shenzen on three separate visits for the duration of three days in March, one week in April and two months in May. They had even made a trip to visit Macau and while in Shenzen the accused had stayed at Ah Poh's condominium.
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> (3) There are no records of the accused's business project with Ah Poh, no agreements, and only very sketchy outlines of the role of the accused in the Project to install locks and to check on installed locks in the said condominium. Also no details of the project in Shenzen beyond a project to install locks in three condominiums.
>
> (4) The accused claimed that P9 belonged to Ah Poh and that Ah Poh had clothes washed. Since Ah Poh owned a condominium in Shenzen and was

staying back in Shenzen, why would he want to send back his dirty clothes to Malaysia via the accused to be washed by one of his workers?

(5) The accused had admitted a pair of pants and a t-shirt found in P9 belongs to the accused. (S)P5 had also testified that the other clothes found in P9 fitted the accused.

(6) If it was true that P9 belongs to Ah Poh who had entrusted it to the accused at the last minute at the airport, where is the accused's own bag? And why would the accused put his own clothes (personal belongings) in Ah Poh's bag, Ah Poh being someone whom the accused claims to be only a business associate and not a personal friend?

The learned judicial commissioner had clearly and specifically found that the version put forward by the appellant in his testimony to be highly implausible and inherently improbable.

[31] We do not find any error in the finding of fact by the learned judicial commissioner. Since the version by the appellant was found to be highly implausible and inherently improbable, it could not therefore provide the least probability to the defence version that the appellant was not the owner of the bag, did not know the nature of the contents secreted in the bag as a proscribed substance.

[32] We observe that according to the appellant their visit to Hong Kong was to renew the appellant's visa, and he expected to return to Shenzen because the door lock installation was not completed yet. It was his testimony that the decision to return to Malaysia was a sudden decision by Ah Poh. If the visit to Hong Kong was to renew the appellant's visa, whichever way one looks at it, it was implausible that Ah Poh brought his bag and the appellant had only a spare pair of trousers and a t-shirt, and further return to Malaysia without the rest of his clothes but to carry Ah Poh's bag instead. If the bag belonged to Ah Poh, there was no explanation why the lock belonged to the appellant, and why he had a lock at Hong Kong Airport before checking-in with no bag of his own.

[33] We observe further that the appellant was a contractor for installation of door locks. He did not explain why he could not possibly have installed the part of the bag in which the proscribed substance was secreted.

[34] We conclude that the learned judicial commissioner did not err in her conclusion that the appellant failed to raise any reasonable doubt in the prosecution's case. We, therefore, dismiss the appeal and affirm the conviction and sentence.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum